No. 96-1085

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BOB McLEMORE AND COMPANY, INCORPORATED, *et al.*,

Petitioners,

vs.

BRANCH BANKING AND TRUST COMPANY and HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHARLOTTE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Fourth Circuit correctly affirm the District Court's judgment granting the motions for summary judgment filed by each Respondent on the grounds that Petitioners had executed written releases that released all claims against Respondents?

LIST OF PARTIES

The respondent, Branch Banking and Trust Company is a North Carolina banking corporation. The respondent, Home Federal Savings and Loan Association of Charlotte is a savings and loan association duly organized and existing under and by virtue of the laws of the United States of America. E. Osborne Ayscue, Jr. and Robert H. Pryor of Smith, Helms, Mulliss & Moore, L.L.P., are counsel of record for Branch Banking and Trust Company. Robert C. Stephens of Horack, Talley, Pharr & Lowndes, P.A., is counsel of record for Home Federal Savings and Loan Association of Charlotte.

Each of the Respondents join in this Brief in Opposition.

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Branch Banking and Trust Company is a wholly owned subsidiary of Southern National Corporation. Branch Banking and Trust Company has two non-wholly owned subsidiaries, NEXUS, Inc. and Autobase Information Systems, Inc. Home Federal Savings and Loan Association of Charlotte is a wholly owned subsidiary of HFNC Financial Corp. Home Federal has no non-wholly owned subsidiaries.

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Respondents, Branch Banking and Trust Company (hereinafter "BB&T") and Home Federal Savings and Loan Association of Charlotte (hereinafter "Home Federal") respectfully request that the Court deny the Petition for Writ of Certiorari to review the unpublished opinion of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

In 1994, Petitioners (sometimes hereinafter referred to as the "McLemore Group") filed suit against the Respondents alleging a number of claims arising out of the lending relationship which had previously existed between the Petitioners, a home building enterprise, and each of the Respondents. All claims rested on the theory that the Respondents had conspired to destroy the Petitioners in order to remove an obstacle to a planned merger between the Respondents (hereinafter referred to as the "Merger Conspiracy Theory"). BB&T moved for summary judgment based upon certain absolute defenses, including the defense that Petitioners had released all claims arising out of the alleged Merger Conspiracy Theory by reason of the McLemore Group's execution of a valid and enforceable written release in favor of BB&T. Home Federal moved for summary judgment, based on certain absolute defenses, including the defense that Petitioners had released all claims arising out of the alleged Merger Conspiracy Theory by reason of the McLemore Group's execution of a valid and enforceable written release in favor of Home Federal. The summary judgment motions were briefed and argued, in separate hearings, before a United States bankruptcy judge, who entered orders recommending that summary judgment be granted on both motions. Thereafter, the motions for summary judgment were briefed for a second time and additional documentation and exhibits were presented to a United States district court judge who agreed with the

bankruptcy judge and entered separate judgments granting summary judgment in favor of the Respondents. Both trial judges found that all claims raised in the action had been released. Petitioners appealed both judgments.

The United States Court of Appeals for the Fourth Circuit consolidated the appeals, conducted a *de novo* review of both orders of the district court's granting summary judgment and affirmed the district court's orders granting summary judgment in favor of the Respondents on all claims.

In Petitioners' Statement of Case, they argue that the Fourth Circuit's decision constitutes an extreme departure from the accepted and usual course of judicial proceedings. In essence, Petitioners simply rehash the factual and legal arguments which they made to the bankruptcy court, the district court and the Fourth Circuit concerning the merits of the underlying summary judgment motions. Because the decision of the Fourth Circuit is clearly correct, was entered after the application of the correct standard of review and simply involves the application of the facts of the case to well established state law, Respondents respectfully submit that the petition should be denied.

STATEMENT OF FACTS

A. BB&T Statement

The opinion of the Fourth Circuit correctly sets forth the facts of the case as they relate to BB&T and BB&T adopts the appellate court's statement of facts.[1]

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1. A copy of the opinion of the Fourth Circuit is reproduced in the Appendix to this Brief in Opposition.

B. Home Federal Statement

Home Federal takes issue with some of Petitioners' recitation of the facts, and like BB&T, urges the Court to review the facts set forth in the opinion of the Fourth Circuit. For convenient reference, however, certain facts which are relevant to the Court's consideration are hereinafter set forth.

1. The McLemore Group's Lending Relationship With Home Federal.

For a number of years, including the 1980's and early 1990's, the McLemore Group and Home Federal enjoyed a profitable lender-borrower relationship. Beginning in 1991, however, numerous McLemore Group loans with Home Federal totaling millions of dollars went into default for nonpayment. Rather than foreclose, Home Federal permitted those loans to remain in default and, instead, worked with the McLemore Group for over two years in an attempt to cure the deficiencies. In 1993, after a number of months of negotiations, Home Federal and the McLemore Group entered into an August 20, 1993 forbearance agreement (hereinafter the "Forbearance Agreement") which granted to the McLemore Group a six month forbearance period during which time properties could be sold and the defaulted loans could be paid. If the properties were not sold, the McLemore Group agreed to deed them back to Home Federal in lieu of foreclosure. The Forbearance Agreement also (1) gave the McLemore Group the opportunity to discount the loans by paying them off early, (2) reduced the interest rate on the loans, and (3) forgave approximately $390,000 in past due interest. The Forbearance Agreement also contained, as is customary in agreements of this type, the McLemore Group's release of all claims against Home Federal. The plain language of that agreement shows clearly that the release is a global release of all claims any member of the McLemore Group might have had against Home Federal.

The six month forbearance period expired with the loans still in default. When Home Federal requested deeds in lieu of foreclosure, the McLemore Group responded by filing this lawsuit.

Both the bankruptcy court and the district court, in addition to dismissing all of petitioners' claims against Home Federal, also entered money judgments in favor of Home Federal against the McLemore Group. In the lawsuit below, Home Federal filed counterclaims seeking the recovery of monies which had previously been loaned to the McLemore Group. Those loans had been in default for over two years and the monies had not been repaid. Robert V. McLemore was found by both trial courts to be obligated to repay these loans by reason of a November 9, 1990 guaranty (the "Guaranty") which he admits he executed. Notwithstanding his present protestations that the Guaranty applied only to loans made after November 9, 1990, Mr. McLemore affirmed the applicability of the Guaranty to loans made prior to November, 1990 when he executed the Forbearance Agreement.[2]

2. *Merger Proposals To Home Federal.*

Some time in 1989, BB&T developed an interest in acquiring Home Federal through a possible merger. From time to time, BB&T made overtures to Home Federal to merge. However, contrary to petitioners' assertions, neither Home Federal nor its officers or directors ever formed any intent to merge with BB&T or ever took any steps in order to consummate a merger with BB&T. Home Federal was an attractive institution and was the object of overtures from a number of suitor banks.

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2. The Forbearance Agreement states on page 1 that: "McLemore and BMC have personally guaranteed all of the Loans pursuant to that certain Guaranty Agreement attached hereto as *Exhibit B* (the 'Guaranty')." The loans referred to in this quote were entered into **prior** to November 9, 1990.

While Home Federal gave some consideration to merger proposals made by a number of banks, including BB&T, it also gave consideration to other scenarios for its future, including conversion to a state-chartered savings and loan association or becoming a publicly-held entity (the choice the institution made in 1995). For reasons which are still unclear to respondents, petitioners incorrectly theorized that the McLemore Group's lending relationship with Home Federal was somehow an obstacle to the merger and that the relationship had to be terminated in order for the merger to go forward. Petitioners' belief in this respect is incorrect. Home Federal's loans to the McLemore Group would not have prevented a merger. More importantly, there was never any agreement, in spirit, principle or otherwise, to merge these two institutions. The claim that these two financial institutions would, over a period of time, conspire with one another to destroy one of Home Federal's largest borrowers and thereby cause millions of dollars of Home Federal loans to go into default under the critical eye of federal regulatory agencies is a preposterous and fictitious claim.

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

Petitioners misstated or miscnaracterized both the facts and the holding of the Fourth Circuit in an attempt to support their assertion that this case "clearly calls for the invocation of this Court's supervisory powers" (Petition, p. 12).[3] Pursuant to Supreme Court Rule 15.2, Respondents will identify and discuss the most prominent of the misstatements or omissions of fact contained in the Petition.[4] As an initial matter, respondents point

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3. Citations to "Petition, p. __", refers to Petitioners' petition.

4. Because this case was dismissed pursuant to Fed. R. Civ. P. 56, the facts are taken in the light most favorable to the Petitioners.

out that the Petitioners have failed to accurately reproduce the Fourth Circuit's opinion and the district court's findings and conclusions. Because the Fourth Circuit's opinion is critical to the understanding of this Brief in Opposition, Respondents have reproduced a correct version of the opinion of the Fourth Circuit in the Appendix to this Brief in Opposition.

- Petitioners mislead the Court regarding BB&T's lending commitments.

Petitioners argue that BB&T led McLemore to believe that its lending commitments were of long-term duration (Petition, p. 8). The undisputed facts show that BB&T and the Petitioners entered into fully integrated written agreements that specified all the terms that would apply to the loans, including the expiration date of the commitment to lend. (App., p. 6a)[5]. The final lending agreement between BB&T and McLemore clearly specified that the lending commitment expired on September 1, 1992. (App., p. 6a).

- Petitioners misrepresent the relationship between Robert V. McLemore and the principal officers of Home Federal, H. Joe King, Jr. and J. Harold Barnes, Jr. (Petition, p. 8)

The relationship between the McLemore Group and Home Federal was nothing more than that of a lender-borrower. It did not rise to a level above that. In furtherance of that relationship, King and Barnes represented Home Federal as two of its officers and employees.

- Petitioners incorrectly allege that Messrs. King and Barnes approved the McLemore Group's proposed expansion plan.

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5. Citations to "App., p. __" refer to the Appendix attached to this Brief in Opposition.

Petitioners argue that Home Federal approved the McLemore Group's expansion plans and orally agreed to fund those plans. (Petition, p.8) Home Federal never approved any expansion plan proposed by the McLemore Group and never committed to make loans to fund any such expansion plan.

- Petitioners fail to inform the Court that the Fourth Circuit expressly determined that it need not consider the parties' other arguments concerning the statute of frauds, the statute of limitations or contract defenses because it found that the releases barred all the Petitioners' claims and finally disposed of the action.

Petitioners argue that the Fourth Circuit ignored certain issues that had been presented to it for its determination. (Petition, p. 17-18). On the contrary, the Fourth Circuit ruled on a well established issue of law that rendered the other issues presented irrelevant and moot and stated, in its opinion, that it need not consider the other issues. (App., p. 12a).

- Petitioners fail to bring to the Court's attention that Mr. McLemore was examined at length concerning the date on which the McLemore Group's alleged claims against the Respondents occurred and that he testified that each of the alleged "wrongful acts" occurred on or before the date the releases were executed.

Petitioners argue that the releases were applied to claims that occurred after the execution of the releases. Detailed deposition testimony from Mr. McLemore does not support this argument.

- Petitioners misrepresent that the facts alleged in their statement of facts were not in dispute.

Petitioners state that the facts alleged in their factual summary and statement of the case were "not disputed" (Petition, p. 7). Many of Petitioners' allegations are either disputed or allege facts which are not supported by any competent evidence. However, these underlying factual disputes are not material because the Petitioners executed written releases, releasing all the claims that could possibly arise from such disputed allegations. Because these allegations do not bear on the issues before this Court, the Respondents will not address each misstatement.

REASONS FOR DENYING THE WRIT

Petitioners argue that certiorari should be granted ". . . because the United States Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings that the supervisory power of this Court must be exercised to correct that departure" (Petition, p. 23). Petitioners claim that they were not given ample opportunity to present matters to the lower courts and that, consequently, they did not receive a fair hearing (Petition, p. 20). These claims are simply inventions created by Petitioners as a part of one last attempt to seek appellate review.[6]

In this case, an experienced bankruptcy court judge and an experienced district court judge, affirmed by a unanimous court of appeals, carefully reviewed the voluminous record that was submitted by Petitioners and, after considering the evidence in the light most favorable to the Petitioners and applying North Carolina law, concluded that the releases executed by the Petitioners bar their claims against BB&T and Home Federal as a matter of law. The Fourth Circuit's opinion is correct. More

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6. Certiorari is not a vehicle by which a party who loses in the lower courts secures another hearing. *Langum Co. v. Coty*, 262 U.S. 159, 163 (1923).

importantly, for the purposes of analyzing Petitioners' plea to this Court, it is substantively unremarkable and can hardly be said to raise important matters sufficient to invoke this Court's certiorari powers. All of the issues raised by the Petitioners concern the interpretation of state law and the application of facts to that law. None of the interpretations of state law by the Fourth Circuit conflict, in any way, with well established North Carolina law. None of the issues raised by the Petitioners deal with federal law or other matters typically of concern to this Court, and none could even arguably merit this Court's attention. Distilled to its essence, the Petitioners complain because they simply disagree with the decision of the bankruptcy court, the district court and the Fourth Circuit.

I.

THIS CASE AND THE HOLDINGS BELOW DO NOT INVOLVE SUCH SPECIAL, COMPELLING OR IMPORTANT ISSUES SO AS TO WARRANT THE GRANTING OF CERTIORARI.

This case is about the dismissal of claims, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that the McLemore Group had entered into valid and enforceable written agreements releasing those claims. That is all that this case is about. Even Petitioners concede that this case simply involves ". . . the propriety of disposition of a case through summary judgment under F.R.C.P. Rule 56" (Petition, p. 6).

The concept that claims may be released is a common law cornerstone which has existed in law for centuries. State and federal trial courts throughout the land routinely hear and grant motions for summary judgment. There is nothing so "compelling" in these facts or these holdings as to require the

Supreme Court of the United States to exercise supervisory powers over the United States Court of Appeals for the Fourth Circuit.

Petitioners also ask this Court to analyze particular facts and interpret and determine the scope of particular written agreements which are peculiar to this case and this case alone. No questions are presented which have importance beyond the particular facts and parties involved. A considerable portion of the Petition is devoted to criticizing the rulings below by contending that the specific language of the releases and the Guaranty do not support those rulings. Certiorari should not be granted to construe particular written agreements, consider specific facts or review evidence on issues not of importance to other litigants, the courts or the general public. *United States v. Johnson*, 268 U.S. 220 (1925).

II.

THE JUDGMENT BELOW WAS PROPER IN ALL RESPECTS.

Petitioners argue that this Court should exercise its supervisory powers because the decision below was erroneous. There is no merit to that claim.

A. The Fourth Circuit's Ruling On The Release Of BB&T And Home Federal Was Correct And Consistent With North Carolina Law.

North Carolina recognizes that a "defendant's plea of a release is a plea in bar going to the plaintiff's entire cause of action, and if established by proof, would defeat and destroy [the plaintiff's] action altogether." *Cowart v. Honeycutt*, 257 N.C. 136, 139, 125 S.E. 2d 382, 384 (1962). In the instant case, the

Petitioners executed releases of both BB&T and Home Federal and received consideration for the releases. The language of the releases encompasses any and all claims and include the claims that the Petitioners are attempting to assert against BB&T and Home Federal in this action. The releases are a complete bar to the Petitioners' claims against BB&T and Home Federal.

The Petitioners argue that "the rulings represent an extreme departure from the accepted and usual course of judicial proceedings" because the release agreements were applied to post-release claims (Petition, p. 16). The only "evidence" upon which Petitioners relied to support this claim is found in Mr. McLemore's Supplemental Affidavit, an affidavit which was filed approximately one month *after* the BB&T summary judgment hearing. In the supplemental affidavit, McLemore states:

> Home Federal's and BB&T's wrongful conduct, as described in the Amended Complaint, continued through 1993.

This untimely, vague and conclusory statement directly contradicts McLemore's earlier deposition testimony. Mr. McLemore testified, in response to detailed questions in his deposition about each of the Petitioner's claims, that the alleged wrongful acts upon which the Petitioners were basing the action related to matters that transpired on or before the date the releases were executed. The Fourth Circuit did not depart from the usual and accepted course of judicial proceedings but, instead, followed the well-articulated rule that a genuine issue of material fact is not created and, therefore, the entry of summary judgment is not precluded when the only issue of fact is to determine which of two conflicting versions of a party's testimony is correct. *Barwick v. Celotex Corp.*, 736 F.2d 946 (4th Cir. 1984) (" 'If a party who has been examined at length

on deposition could raise an issue of fact by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment for screening out sham issues of fact.' " *Id.* at 960. (quoting *Perma Research and Development Co. v. Singer*, 410 F.2d 572, 578 (2nd Cir. 1969))

Petitioners accuse the Fourth Circuit of ignoring evidence and authorities on Petitioners' argument that fraud voided the releases. Nothing could be further from the truth. The allegations of fraud and "fraud in the treaty" were briefed and argued at length by Petitioners. The court of appeals clearly considered those arguments and rejected those arguments, holding that ". . . the McLemore Group was not induced by fraud to enter into the workout agreements with BB&T and Home Federal." (App., p. 12a). In doing so, the Fourth Circuit followed established North Carolina law.

Petitioners argue they did not have ample opportunity to present matters before the courts below and that they did not, therefore, receive a fair hearing (Petition, p. 20). Actually, the reverse is true. The summary judgment motion by BB&T was argued in November of 1994. The summary judgment motion by Home Federal was argued in March, 1995. For *each* motion, Petitioners had an opportunity at the bankruptcy court level and at the district court level to argue against the granting of summary judgment and to raise issues regarding the validity and scope of the release agreements. They took full advantage of those opportunities. Legal briefs, exhibits and other evidence in plentiful amounts were presented to the bankruptcy judge on two occasions and to the district court judge on a third occasion. On appeal to the Fourth Circuit, Petitioners requested and were granted the opportunity to file a brief in excess of the normal page limits. They submitted to the court of appeals an appendix consisting of eleven volumes and containing 3,949 pages.

Notwithstanding all of that, two trial judges granted summary judgment and a panel of the United States Court of Appeals for the Fourth Circuit affirmed that ruling in an unpublished *per curiam* opinion.[7]

Thereafter, the entire United States Court of Appeals for the Fourth Circuit denied Petitioners' request for rehearing and rehearing *in banc*.

B. The Fourth Circuit Correctly Refused To Issue An Advisory Opinion On Moot Issues.

Petitioners fault the Fourth Circuit for failing to address their arguments regarding the statute of frauds, statute of limitations and various contract defenses that were raised in the proceedings below. The trial courts did find that there were alternative reasons (*i.e.*, the statute of frauds, the statute of limitations and the argument that alleged oral loan commitments were missing terms required to make them legally enforceable) to grant summary judgment in Respondents' favor. The Fourth Circuit, following well-established precedent, simply noted that it was not going to address those issues because the issue which it did address, the releases, fully and finally disposed of the action in its entirety. *See Karsten v. Kaiser Foundation Health Plan*, 36 F.3d 8 (4th Cir. 1994) (holding it would be inappropriate to engage in the practice of advisory opinion-making which would simply generate *dicta).* More particularly, the Fourth Circuit held:

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7. The fact that the opinion is unpublished is significant. Under the Fourth Circuit's Local Rules, an opinion is published only if it satisfies a number of standards, including whether the opinion establishes, alters, modifies, clarifies or explains a rule of law, or involves a legal issue of continuing public interest. (Local Rule 36(a) of the Fourth Circuit) According to Local Rule 36(c), the Fourth Circuit will not usually cite an unpublished opinion and use of unpublished opinions in briefs and oral arguments is disfavored.

> We agree with the district court that the release provisions in the workout agreement is a valid defense against all of the McLemore group's claims against BB&T and Home Federal. Therefore, we need not consider the McLemore group's other arguments.

(App., p. 12a)

Similarly, Petitioners complain that the court of appeals made no reference to their argument that the Guaranty did not cover loans made prior to the date the Guaranty was executed.[8] They also argue that the Fourth Circuit failed to make a reference to their claim that the Home Federal release was limited to claims pertaining to certain loans.[9] Such references are not required. Local Rule 36(b) of the Fourth Circuit's Federal Rules of Appellate Procedure provides that unpublished opinions may not discuss or set out all facts or all of the background of the case, and that in unpublished opinions, the court may simply adopt the reasoning of the lower court.

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8. After reviewing the Guaranty, the district court specifically found that, pursuant to the Guaranty, Mr. McLemore became a guarantor of all Home Federal loans, **past and present**. (Petition, p. A-44).

9. *See* Petition, p. A-71 which set out the language of the Home Federal release. Therein, the McLemore Group releases all defenses, setoffs, offsets, equities, counterclaims or other claims arising out of the course of dealing between Home Federal and the McLemore Group.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ARGUED APRIL 5, 1996

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2938

In Re: Maco Homes, Incorporated,

Debtor.

Bob McLemore and Company, Incorporated; Bob McLemore Homes, Incorporated; Apple Homes, Incorporated; Apple Realty 2000, Incorporated; BMI Land Company, Incorporated; Maco Homes, Incorporated,

Plaintiffs-Appellants,

v.

Branch Banking & Trust Company; Home Federal Savings and Loan Association of Charlotte.

Defendants-Appellees.

v.

Robert V. McLemore,

Third Party Defendant-Appellant.

Appendix A

No. 95-2939

In Re: Maco Homes, Incorporated,

Debtor.

Bob McLemore and Company, Incorporated; Bob McLemore Homes, Incorporated; Apple Homes, Incorporated; Apple Realty 2000, Incorporated; BMI Land Company, Incorporated; Maco Homes, Incorporated,

Plaintiffs-Appellants,

v.

Branch Banking & Trust Company; Home Federal Savings and Loan Association of Charlotte.

Defendants-Appellees.

v.

Robert V. McLemore,

Third Party Defendant-Appellant.

Appeals from the United States District Court
for the Western District of North Carolina, at Charlotte,
Graham C. Mullen, District Judge.
(CA-95-60-3-MU, CA-95-4-3-MU, BK-94-30421)

Argued: April 5, 1996

Decided: September 10, 1996

Appendix A

Before RUSSELL and MOTZ, Circuit Judges, and LAY, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wyatt B. Durrette, Jr., DURRETTE, IRVIN & BRADSHAW, P.C., Richard, Virginia for Appellants. Edwin Osborne Ayscue, Jr., SMITH, HELMS, MULLISS & MOORE, L.L.P., Charlotte, North Carolina, for Appellee Branch Banking; Robert C. Stephens, HORACK, TALLEY, PHARR & LOWNDES, Charlotte, North Carolina for Appellee Home Federal. **ON BRIEF:** William O. Quirey, Hammarstrom Davies, Durham, North Carolina for Appellants. Robert H. Pryor, SMITH, HELMS, MULLIS & MOORE, L.L.P., Charlotte, North Carolina, for Appellee Branch Banking, G. Robert Turner, III, Zipporah Marie Basile, HORACK, TALLEY, PHARR & LOWNDES, Charlotte, North Carolina, for Appellee Home Federal.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Bob McLemore & Co., Inc. ("BMC") and its subsidiary companies (collectively, the "McLemore group"), brought numerous claims against Home Federal Savings & Loan Association of Charlotte ("Home Federal") and Branch Bank

& Trust Co. ("BB&T"). On the defendants' motions for summary judgment, the district court dismissed all claims against the defendants because the McLemore group had previously executed valid, written agreements releasing the defendants from all such claims. The McLemore group allege that they entered into those written releases under fraud and duress. We agree with the district court's finding that no fraud or duress occurred, and we affirm the judgment of the district court.

I.

Robert V. McLemore is the president and sole shareholder of BMC, which is engaged in land development and home construction. BMC is the corporate parent of BMI Land Co., Inc., ("BMI Land"), Bob McLemore Homes, Inc. ("BMH"), Apple Homes, Inc. ("Apple Homes"), Apple Realty 2000, Inc. ("Apple Realty"), and MACO Homes, Inc. ("MACO Homes"). BMI Land is engaged in the purchase and development of tracts of land for home construction. BMH and Apple Homes are engaged in the construction of new homes. To induce customers to purchase new homes, McLemore created the "trading places" program; under this innovative program, a person who signed a construction contract for a new home with BMH or Apple Homes could trade in his existing home, which the McLemore group agreed to sell before the completion of the new home. Apple Realty was created to list and sell the new home buyers' existing homes. If Apple Realty could not sell the existing home before the closing of the new home, MACO Homes would purchase the existing home and manage it as rental property.

Since 1972, the McLemore group worked closely with Home Federal to finance all phases of its construction operations. When the McLemore group wanted to begin development of a

property, Home Federal would make the initial acquisition and development loan to BMI Land. When BMH or Apple Homes sold lots to individual home buyers, Home Federal would make the construction loans to McLemore and use the proceeds of those loans to pay down the initial acquisition and development loan. After construction of the new homes and upon closing with the home buyers, Home Federal made the permanent mortgage loans to the home buyers and used the proceeds to pay down the construction loans. If necessary, Home Federal made a second permanent mortgage loan to finance the sale of the customer's existing home either to a third-party or to MACO Homes. For many years, the McLemore group and Home Federal enjoyed an extremely close and very profitable financing relationship.

In 1988, the McLemore group proposed a drastic expansion in the scope of its business — from three to nineteen residential development projects. Home Federal approved the financing of the new construction, and the McLemore group began purchasing and developing tracts of land.

In August 1989, however, Congress enacted the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA"), which necessarily altered the McLemore group's financing relationship with Home Federal. FIRREA imposed a requirement on thrift institutions that prevented them from extending more than 15% of its unimpaired capital to a single borrower. Although a thrift could seek and receive a waiver from the Office of Thrift Supervision ("OTS"), allowing it to loan up to 30% of its unimpaired capital to a single borrower, even the 30% limit restricted Home Federal's ability to continue financing the McLemore group's activities in the same manner as it had in the past.

Appendix A

Because Home Federal could no longer meet all of the McLemore group's financing needs, the McLemore group started doing business with BB&T, which had actively sought the McLemore group as a client. On March 28, 1990, BB&T executed a commitment to loan the McLemore group seven million dollars — one million dollars to BMI Land for land development, five million dollars to BMH and Apple Homes for homes construction, and one million dollars to MACO Homes for the purchase of rental homes. On August 7, 1991, BB&T and the McLemore group executed another commitment agreement that replaced the March 28, 1990 agreement. The terms of the August 7, 1991 agreement specified that the commitment to lend expired on September 1, 1992. Between March 1990 and June 1992, BB&T made loans to the McLemore group in accordance with the terms of the commitment agreements.

By June 1992, however, BB&T had determined that the financial condition of the McLemore group was deteriorating. One June 24, 1992, BB&T informed the McLemore group that it would not renew its commitment to provide financing beyond the September 1, 1992 expiration date of the August 7, 1991 agreement. BB&T and the McLemore group negotiated a schedule by which the McLemore group would repay its outstanding debts to BB&T. The parties executed a repayment agreement on October 5, 1992. By December, 1992, the McLemore group had defaulted under the terms of the repayment agreement. The parties began negotiating a workout agreement for the McLemore group's defaults.

On April 8, 1993, the McLemore group and BB&T executed a written workout agreement. Under this agreement, BB&T accepted the deeds to certain properties and released the

McLemore group from its indebtedness on those properties, thus avoiding the need for foreclosure proceedings. BB&T also extended some of the McLemore group's obligations and loaned additional money to pay certain liens and interest payments, thus giving the McLemore group an opportunity to work out the defaults on some of the properties. The McLemore group also released BB&T from any and all claims known or unknown, absolute or contingent, matured or unmatured that the McLemore group had against BB&T. During the course of the negotiations culminating in the workout agreement, the McLemore group was represented by counsel.

The McLemore group subsequently defaulted on the terms of the April 8, 1993 workout agreement, and BB&T foreclosed on the remaining properties.

Meanwhile, the McLemore group's financial position with Home Federal had also deteriorated. The McLemore group defaulted on its Home Federal loans in 1991. As it had done in the past, Home Federal worked with the McLemore group to bring the loans current. By June 1993, MACO Homes had defaulted on all its loans from Home Federal, as well as its loans from Southern National Bank of North Carolina ("Southern National") and United Carolina Bank ("UCB"). After a series of negotiations, the McLemore group, Home Federal, Southern National, and UCB entered an agreement, in which the three banks loaned MACO Homes additional funds to bring its loans current.

By July 1993, the McLemore group remained in default on the acquisition and development loans to BMI Land and the home construction loans to BMH. The McLemore group and Home Federal negotiated a workout agreement, which the parties

executed on August 20, 1993. Under this agreement, Home Federal granted the McLemore group a six-month forbearance period on its defaults, giving the McLemore group a chance to sell properties and pay down its indebtedness. Home Federal also reduced the interest rate on certain loans during this forbearance period, and it forgave $390,206 in past due interest. The workout agreement also included the McLemore group's release from any claims that the McLemore group had against Home Federal. The McLemore group was represented by counsel when it negotiated and signed the workout agreement with Home Federal.

The McLemore group was unsuccessful in its efforts to sell properties and to pay down its outstanding debt. At the end of the forbearance period, the McLemore group's loans remained in default. Home Federal informed the McLemore group of its obligation under the workout agreement to deliver the deeds to Home Federal in lieu of foreclosure.

In response, the McLemore group filed a complaint against Home Federal and BB&T in North Carolina state court on February 22, 1994. When three of the McLemore group companies filed for bankruptcy, this action was removed to the United States Bankruptcy Court for the Western District of North Carolina. In two separate entries of proposed findings of fact and conclusions of law, the bankruptcy court recommended the entry of summary judgment on all claims against Home Federal and BB&T because, *inter alia*, the April 8, 1993 workout agreement and the August 20, 1993 workout agreement released Home Federal and BB&T from all of the claims brought by the McLemore group. The district court adopted verbatim the bankruptcy court's proposed findings of fact and conclusions of law. The McLemore group filed a timely appeal.

Appendix A

II.

We review the district court's grant of summary judgment de novo. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 958 (4th Cir. 1996). Although the district court asserted several reasons for dismissing the McLemore group's claims, its primary reason was the existence of the release provisions in the April 8, 1993 and August 20, 1993 workout agreements. The McLemore group contends that the district court should not have enforced the release provisions for two reasons: first, the McLemore group signed the workout agreements under duress, and second, the McLemore group was defrauded into signing the workout agreements. We consider each argument in turn.

A. *Duress*

Under North Carolina law, a person who enters into a contract under duress can avoid his obligations under that contract. Duress exists "where one by the unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Adder v. Holman & Moody, Inc.*, 219 S.E.2d 190, 194 (N.C. 1975). Although duress may arise from the wrongful use of physical force or threats of physical force, it can also arise from the wrongful exertion of economic pressure. However, not every imbalance in economic power creates a situation of economic duress. Economic duress arises from the illegitimate use of economic power outside the bounds of a contract or the law. *See Rose v. Vulcan Materials Co.*, 194 S.E.2d 521, 536 (N.C. 1973). Thus, the mere threat by one party to breach a contract, though wrongful, does not establish economic duress. *Id.* Economic duress occurs when a party's wrongful action forces another to make a contractual promise, or else suffer irreparable

injury to his business. *See id.* In addition, the wronged party must have "no immediate and adequate remedy in the courts" that would enable him to resist the other's demands. *Id.*

The McLemore group contends that it signed the workout agreements under duress. We disagree for two reasons. First, neither BB&T nor Home Federal exerted any undue economic pressure on the McLemore group. The threat of foreclosure certainly pressured the McLemore group into signing the workout agreements, but BB&T and Home Federal had the legal right to threaten foreclosure because the McLemore group defaulted on its loans. Neither BB&T nor Home Federal created the McLemore group's weak financial position, thus forcing it to negotiate workout agreements from a weak bargaining position.[1]

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1. The McLemore group alleges that Home Federal created artificial defaults by deliberately misapplying the McLemore group's loan payments: instead of using loan payments first to pay off any interest due and then to pay down principal, Home Federal began applying the entire loan payment to pay down principal, thus allowing the McLemore group to fall behind on interest payments. The McLemore group has supported its allegations with verified affidavits, and we do not resolve this factual dispute at this stage of the proceedings.

Nonetheless, such misconduct, even if it occurred, would not establish that the McLemore group signed the workout agreement with Home Federal under duress. If Home Federal had misapplied loan payments, the McLemore group either knew or should have known of this fact before it signed the workout agreement. Although the McLemore group trusted Home Federal to handle the accounting of its loan payments, it had a duty to make at least some inquires to ensure that Home Federal kept the books correctly. Certainly by the time Home Federal threatened foreclosure proceedings, the McLemore group should have investigated to ensure that Home Federal had correctly applied the loan payments to its debts. By signing the workout agreement, the McLemore group chose to release Home Federal from its misconduct in exchange for a forbearance period to cure its loan defaults.

Second the undisputed evidence in the record demonstrates that, as an alternative to signing the workout agreements, the McLemore group could have sought the protection of the bankruptcy code. Instead, and with the hopes of savings its business, the McLemore group chose to enter workout agreements that released BB&T and Home Federal from any actions it could pursue against them. Because the McLemore group had an alternative to signing the workout agreements, it cannot argue that it entered those agreements under duress.

B. *Fraud*

Next, the McLemore group contends that BB&T and Home Federal, on several occasions, represented to it that BB&T and Home Federal were not planning a merger. The McLemore group alleges that BB&T and Home Federal began merger negotiations as far back as 1989, culminating in a merger agreement at the end of 1993. The McLemore group also alleges that Home Federal represented to the McLemore group that the OTS had denied Home Federal a 30% waiver in 1992, when in fact Home Federal never applied for such a waiver. Furthermore, the McLemore group alleges that Home Federal misapplied the McLemore group's payments, causing the McLemore group to fall behind in its interest payments and to default on its loans. The McLemore group argues that it would not have signed the workout agreements if it had known about the defendants' fraud.

Although the McLemore group's allegations may serve as the basis of fraud actions against BB&T and Home Federal, the McLemore group released the defendants from such actions in the workout agreements. There is no evidence in the record that BB&T and Home Federal fraudulently induced the McLemore group to sign the release agreements. With regard to each of the

two workout agreements, the district court found that the McLemore group actively participated in the negotiations, reviewed drafts of the agreement, and made changes to the agreement. The McLemore group was represented by counsel throughout the negotiations and the signing of the agreements. The district court found that the McLemore group knew that each workout agreement contained a release provision when it signed the agreement.

Like the district court, we conclude that the undisputed facts demonstrate that the McLemore group was not induced by fraud to enter into the workout agreements with BB&T and Home Federal.

III.

We agree with the district court that the release provision in the workout agreements is a valid defense against all of the McLemore group's claims against BB&T and Home Federal. Therefore, we need not consider the McLemore group's other arguments. We affirm the district court's entry of summary judgment in favor of the defendants on all claims.

AFFIRMED

APPENDIX B — RULES INVOLVED

FOURTH CIRCUIT RULES

LOCAL RULE 36(a). PUBLICATION OF DECISIONS

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticize existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgements only if the opinion has been in circulation for ten days.

Adopted effective December 1, 1995.

Appendix B

LOCAL RULE 36(b). UNPUBLISHED DISPOSITIONS

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published and certain unpublished opinions of the Court by paying an annual subscription fee for this service. In addition, copies of such opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. All opinions are available on ABBS, the Appellate Bulletin Board System, for a minimum of six months after issuance. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

Adopted effective December 1, 1995.

Appendix B

LOCAL RULE 36(c). CITATION OF UNPUBLISHED DISPOSITIONS

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

Adopted effective December 1, 1995.